IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Steve Weinberg,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	**Civil Action No. 3-06-CV2332-B**
	§	**ECF**
National Football League Players	§	
Association, Roger Kaplan,	§	
Gene Upshaw, Tom DePaso,	§	
Richard Berthelson, Keith Washington,	§	
Mark Levin, and Trace Armstrong	§	
	§	
Defendants.	§	

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF HIS MOTION TO REMAND

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TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Plaintiff Steve Weinberg, by and through counsel to file this Reply Brief in Support of his Motion to Remand and in support thereof would respectfully show the Court, as follows:

I.

ARGUMENT AND AUTHORITIES

A. Plaintiff Is Not Challenging the NFLPA's Exclusive Bargaining Powers Under Section 9(a) But Instead Are Asserting Legal Rights Independent of the CBA.

To no avail, Defendants mischaracterize Weinberg's state law claims by couching them as a challenge to his decertification itself.[1] Weinberg does not challenge the NFLPA Defendants exclusive bargaining powers under Section 9(a) of the National Labor Relations Act ("NLRA"), nor does he allege that the decertification process was improper.[2] Instead, Weinberg alleges that Defendants actions *prior* to the decertification were tortious and fraudulent. Defendants argument, however, essentially makes the NFLPA immune from violating state law, as long as the violation tangentially relates to the Union's exclusive bargaining powers under Section 9(a) of the NLRA.

Weinberg does not challenge "the Union's right to act as the bargaining agent for NFL players,"[3] but rather, the NFLPA's fraudulent, tortious and blatantly illegal conduct that ruined Weinberg's career. As such, Weinberg's claims are not "completely preempted" under Section 9 of the NLRA.

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[1]*See* Defendants' Response to Motion to Remand ("Defendants' Response") at 6.

[2]*See* Defendants' Response at 6, ¶ 1.

[3]*See* Defendants' Response at 6, ¶ 1.

B. Defendants Mischaracterize the Case Law.

1. *Collins* is distinguishable and not controlling.

Defendants improperly rely on *Collins*, a 15 year-old case from the United States District Court, District Colorado between an NBA Player Agent and the National Basketball Players Associations ("NBPA").[4] In *Collins*, the plaintiff-agent challenged "the union's monopolization of the representation of the basketball players in their negotiations with NBA teams."[5] That is, he objectively challenged the entire representation process and the related collective bargaining agreement.[6] In sharp contrast, Weinberg exclusively challenges the Defendants' tortious and wrongful conduct prior to and subsequent to his decertification, not the decertification process itself. Furthermore, Defendants conveniently characterize Weinberg's claims as parallel to those in *Collins*. Defendants state, "the Court thus held that Collin's state law claims for tortious interference were preempted by Section 9(a) of the NLRA," without mentioning that the state law claims were directly challenging the collective bargaining agreement ("CBA") and related decertification process, **not** independent and unrelated conduct.[7] Again, Weinberg does not dispute the process or the Defendants' authority, only their conduct outside and independent of the decertification process.

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[4]*See, generally, Collins v. Nat'l Basketball Players Ass'n*, 850 F. Supp. 1468 (D. Colo. 1991), *aff'd* 976 F.2d 740 (10th Cir. 1992).

[5]*Collins*, 1474-1475.

[6]*See id.*

[7]*See id.* at 1481.

2. **Defendants again ignore controlling case law.**

Furthermore, Defendants completely ignore *Caterpillar*—the controlling case authority—and rely on *Richardson, et al., v. United Steel Workers of America*, 864 F.2d 1162 (5th Cir. 1989). In *Richardson*, the plaintiffs brought an action against a union alleging that the union breached a fiduciary duty owed to the plaintiffs by not advising the plaintiffs of their employers right to replace them if plaintiffs went on strike. *See id.* The court found that the union's right to act as plaintiff's bargaining agent was conferred by federal statute.[8] Any breach of that right would be a question of federal law and preempt similar state law claims because the duty that the plaintiffs complain was breached was derived from federal law.[9] Weinberg's claims are very distinguishable. For example, Weinberg alleges that Gene Upshaw "personally instruct[ed] certain NFL players represented by Weinberg not to pay him agent fees...[and] then circulated a memorandum to certain Contract Advisors instructing them that none of their clients should pay any of their agent fees that were due to Weinberg."[10] Weinberg's right to avoid this tortious interference with his existing contracts is a right conferred by the common law of Texas and actionable in Texas state court—very distinguishable from a breach of duty derived from a federal statute.[11]

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[8]*See Richardson*, at 864 F2.d, 1165 ("The Union's right to act as plaintiff's bargaining agent is conferred be the NLRA, and we hold that the duties corresponding to this right conferred by federal labor law are likewise defined solely be federal labor law.").

[9]*See generally, id.*

[10]*See* Plaintiff First Amended Petition, at ¶ 86, filed November 20, 2006.

[11]*See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207 (Tex. 2002).

3. **Weinberg's litigation history is irrelevant to the present action.**

Defendants turn to Weinberg's litigation history in an attempt to support their misguided position.[12] The *Sowell* case was a fee dispute involving Weinberg in his capacity as an NFLPA Contract Advisor who represented Jerald Sowell, a former NFL Player employed with the New York Jets.[13] The dispute was related to the NFLPA Standard Representation Agreement ("Agreement"), which provided that all disputes between players and contract advisors would be resolved through the NFL's arbitration procedures.[14] Defendants once again miss the mark: Weinberg's claims are based on common law rights, not federal law. Therefore, Weinberg's claims are clearly distinguishable from those in *Sowell.*

C. **Weinberg's Claims Are Not Preempted by Section 301 of the LMRA.**

Instead of hanging his hat on a single (and very distinguishable) district court case from another circuit, Weinberg relies on the United States Supreme Court's decisions in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) and *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) to illustrate that Section 301 of the Labor Management Relations Act ("LMRA") does not preempt Weinberg's state law claims.[15] These cases clearly articulate the long held principle that tort or contract claims based on state law are not preempted by Section 301 as long as they are independent of the CBA.[16] In fact, the claims may be parallel to those covered by CBA as long as they are independent and can be adjudicated without interpretation of the agreement.[17]

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[12]*See* Defendants' Response to Motion to Remand at 14.

[13]*See* Appendix in Support of the NFLPA Defendants' Response to Plaintiff's Motion to Remand ("App.") at 34-36.

[14]*See id.*

[15]*See* Plaintiff's Motion to Remand at 4-5.

[16]*Caterpillar*, at 396; *see also Lingle* at 407.

1. **Weinberg's claims do not require substantial analysis of the CBA.**

Weinberg's claims are for fraud, tortious interference with existing contracts, tortious interference with prospective business relations, and conspiracy. These claims do not rely on, or require "substantial analysis" of the CBA or the NFLPA Regulations. For example, this Court does not have to look to the CBA to determine if the Defendants conspired to commit a tort that resulted in detriment to Weinberg. Rather, the Court should look to the Defendants wrongful and tortious conduct, to thereby determine that state law applies independent of the CBA.

Weinberg's state law claims are not inextricably intertwined with the terms of the CBA, and the application of Texas state law to this dispute will not require interpretation of the CBA. Weinberg does not challenge what the NFL teams, the NFL players and/or agents agreed to do or do not under the CBA or the Regulations. Rather, Weinberg is asserting his right under Texas state law not to have the NFLPA Defendants tortiously interfere with existing contracts or with prospective business relations and not to have the NFLPA Defendants enter into a conspiracy whose unlawful intent was to destroy Weinberg's life work and passion.

2. **Weinberg's claims are not founded directly on rights created by the NFLPA Regulations.**

Additionally, Weinberg's claims are not "founded directly on rights created by a labor agreement."[18] Apparently Defendants are claiming that the CBA vests Weinberg with a right to avoid intentional torts and conspiracy, which he is now asserting.[19] To the contrary, Weinberg's

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[17] *See Lingle* at 407.

[18] *See* Defendants' Response at 9, ¶ 1.

[19] *See* Defendants' Response at 9, ¶ 1.

Texas state law claims are based on duties owed to the general public, not the CBA or the NFLPA Regulations. They are based on common law duties unrelated to the CBA and are therefore not preempted.[20] Weinberg did not give up his common law right to bring claims against the Defendants simply by virtue of becoming a Contract Advisor. The Defendants did not have the legal right under any part of the CBA, Section 301 of the LMRA or Section 9 of the NLRA to defraud Weinberg, unlawfully conspire against Weinberg, and to unlawfully tortiously interfere with Weinberg's existing contracts or with Weinberg's prospective business relations.

D. Collins and Washington Are Properly Joined.

To re-state the applicable standard, a defendant alleging "fraudulent joinder" or "improper joinder" bears a heavy burden.[21] To prove fraudulent joinder, the removing party must clearly establish: (1) there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or (2) there has been outright fraud in plaintiff's pleading of jurisdictional facts.[22] When ruling on a defendant's assertion of fraudulent or improper joinder, the Court must evaluate all of the factual allegations of the complaint in the light most favorable to plaintiff, resolve all contested issues of fact in favor of plaintiff, and "then examine relevant state law and resolve all uncertainties in favor of the non-removing party."[23] The relevant inquiry is whether the plaintiff "has any possibility of recovery" against the party whose joinder is questioned.[24]

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[20]*See, e.g., Chuy v. Philadelphia Eagles Football Club*, 431 F. Supp. 254 (E.D. Pa. 1977) (football player's claim against team for vicarious liability on behalf of team doctor not preempted); *Hendy v. Losse*, 925 F.2d 1470 (9th Cir. 1991) (football player's claim for negligent hiring of team doctor not preempted); *Hanks v. General Motors Corp.*, 906 F.2d 341, 343-44 (8th Cir. 1990) (auto worker's claim for negligent hiring of co-worker not preempted); *Hayden v. Reicherd*, 957 F.2d 1506, 1509 (9th Cir. 1991) (battery claim not preempted); *Peterson v. BMI Refractories*, 132 F.3d 1405, 1413 (11th Cir. 1998) (intentional tort claims not preempted); *Lee v. Pfeifer*, 916 F. Supp. 501, 509 (D. Md. 1996) ("Lee's assault claim does not require interpretation of the collective bargaining agreement and therefore is not preempted by § 301 of the LMRA").

[21]*See Cavallini v. State Farm Auto. Inc. Co.*, 44 F.3d 256, 259 (5th Cir. 1995) (stating that burden of proving fraudulent joinder is a heavy one); *Ford v. Elsbury*, 32 F.2d 931, 935 (5th Cir. 1994) (citing *Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40 (5th Cir. 1992) (stating that removing party must demonstrate that there is no possibility plaintiff will be able to establish a cause of action). *See also B., Inc.*, 663 F.2d at 549 ("The burden of persuasion placed upon those who cry 'fraudulent joinder' is indeed a heavy one.").

1. **The Defendants cannot demonstrate that Weinberg does not have any possibility of recovery.**

All of the elements for Weinberg's claims against Collins and Washington are properly set forth in the First Amended Petition and must be accepted as true for purposes of analyzing whether Collins and/or Washington were improperly joined as defendants to defeat complete diversity.[25] To reiterate, Weinberg alleged that Collins twice participated in the NFLPA Defendants' unlawful conspiracy by (1) giving false testimony in Weinberg's appeal of his three year decertification and (2) drafting and implementing an escrow fund that wrongfully withheld agent fees rightfully earned by Weinberg.[26] The Petition alleges that Collins lied and/or made reckless false statements about whether Weinberg had violated the Texas Fraudulent Transfer Act by transferring certain assets to avoid paying a lawful judgment to his former partner. Weinberg alleges that these statements were false because (i) he received cash at or near market value on all asset transfers and (ii) the judgment he is alleged to have tried to defeat was declared "unenforceable" and "void for vagueness."[27] Clearly, Weinberg's claims are not ambiguous, as Defendant's would lead this Court to believe. Instead, the Petition specifically identifies factual allegations to support Plaintiff's claims that non-diverse defendants participated in an alleged conspiracy.

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[22]*See Cavallini*, 44 F.3d at 29 (citing *Green v. Amerada Hess*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984)).

[23]*See Cavallini*, 44 F.3d at 259; *Ford*, 32 F.3d at 935; *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981) ("[W]e have consistently held that it is the party who urges jurisdiction upon the court who must always bear the burden of demonstrating that the case is one which is properly before the federal tribunal.").

[24]*See Parks v. New York Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1064) (fraudulent joinder must be established by clear and convincing evidence). *See also Bankard v. Wyeth-Ayerst Labs. Co.*, 898 F. Supp. 426, 428 (E.D. Tex. 1995).

[25]*See* Petition (doc. 1-5), Count Two (Conspiracy to Commit Fraud) at ¶¶ 101-108; Count Four (Conspiracy to Tortiously Interfere with Existing Contracts) at ¶¶ 114-121; and Count Six (Conspiracy to Tortiously Interfere with Prospective Business Relations) at ¶¶ 127-134.

2. Weinberg's Petition properly alleges Texas state law claims.

Defendants claim that Weinberg has failed to properly assert Texas state law claims against Washington and Collins.[28] The elements of Weinberg's conspiracy claim are the following: (1) the defendant was a member of a combination of two or more persons; (2) the object of the combination was to accomplish (i) an unlawful purpose, or (ii) a lawful purpose by unlawful means; (3) the members had a meeting of the minds on the object or course of action; (4) one of the members committed an unlawful, overt act to further the object or course of action; and (5) the plaintiff suffered injury as a proximate result of the wrongful act. *See J.T.T. v. Chan Tri*, 162 S.W.3d 552, 556 (Tex. 2005). Weinberg alleges that Collins participated in the conspiracy by tortiously interfering with existing contracts by wrongfully failing to return funds in an escrow account that Weinberg had rightfully earned. Acting on instructions from Berthelsen, Collins opted to pay the money instead to Weinberg's former partner, resulting in an injury to Weinberg in Texas.[29] For the purpose of Defendants improper joinder argument, Weinberg's allegations must be taken as true.[30] Accordingly, because Weinberg has colorable claims against Washington and Collins, diversity jurisdiction can not exist.

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[26]*See id.* at ¶ 83.

[27]*See* Petition (doc. 1-5 ¶ 82).

[28]*See* Defendants' Response at p. 21-23.

II.

CONCLUSION

Wherefore, premises considered, Plaintiff Weinberg respectfully requests that the Court grant this reply brief in support of his motion to remand, award him attorneys' fees, and grant him all other relief the Court deems just and appropriate in equity or at law.

Respectfully submitted,

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[29] *See* Plaintiff's Motion to Remand at p. 21, ¶ 2.

[30] *See Cavallini*, 44 F.3d at 259; *Ford*, 32 F.3d at 935; *see also B., Inc.*, 663 F.2d at 549.

CERTIFICATE OF SERVICE

On March 27, 2007, I electronically transmitted the foregoing Plaintiffs' Reply Brief in Support of its Motion to Remand using the ECF System for filing a Notice of Electronic Filing to those parties registered for ECF in this case. I further certify that the foregoing document was served on all counsel of record by ECF.

/s/ R. Brian Shields
R. Brian Shields

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